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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

## No. 108.

OHIO VALLEY NATIONAL BANK, PLAINTIFF IN ERROR,

*vs.*

JOHN HULITT, RECEIVER OF THE FIRST NATIONAL BANK OF HILLSBORO, OHIO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED AUGUST 30, 1905.

(19,891.)

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No. 1386.

United States Circuit Court of Appeals, Sixth Circuit.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff in Error,
*vs.*
OHIO VALLEY NATIONAL BANK, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

*Record.*

Original Transcript Filed December 10, 1904.

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, Western Division, ss:*

At a stated term of the Circuit Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the city of Cincinnati, O., in said district, on the first Tuesday of October, being the fourth day of that month in the year of our Lord one thousand nine hundred and four, and of the independence of the United States of America, the one hundred and twenty-eighth.

Present, the Honorable Albert C. Thompson, District Judge, sitting and holding circuit court.

Among the proceedings had were the following, to-wit:

*Petition.*

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff,
*vs.*
THE OHIO VALLEY NATIONAL BANK, Defendant.

Be it remembered that heretofore, to-wit, on the 8th day of October in the year of our Lord one thousand nine hundred, came the plaintiff by his attorneys and filed in the clerk's office of the court aforesaid his certain petition in this cause against the defendant, which said petition was clothed in the words and figures following, to-wit:

United States Circuit Court, Southern District of Ohio, Western Division, *ss:*

*Petition.*

JOHN HULITT, Receiver, etc.,
*vs.*
THE OHIO VALLEY NATIONAL BANK.

The plaintiff states:

1. The First National Bank of Hillsboro, Ohio, is a banking association duly incorporated under the laws of the United
2 States for the creation and government of national banking associations. Its banking house was at Hillsboro, Ohio, and it was there engaged in the business of banking until the 16th day of July, A. D. 1896, at which last mentioned date it suspended payment and closed its doors.

2. On the 22nd day of July, A. D. 1896, the comptroller of the currency of the United States, in accordance with said laws for the government of national banking associations, and with the concurrence of the secretary of the treasury of the United States, duly appointed the plaintiff receiver of the said The First National Bank of Hillsboro, Ohio, and the plaintiff thereupon qualified as such receiver and took possession of the assets of said bank, and is now engaged in the administration of said trust.

3. On the 27th day of April, A. D. 1897, the said comptroller of the currency duly and regularly made an assignment and demanded, under his official seal, and in pursuance of sections 5131 and 5234 of the Revised Statutes of the United States, upon all the shareholders of said bank for one hundred thousand dollars ($100,000), to be paid by them ratably on or before the 27th day of May, A. D. 1897, and upon each and every shareholder of said bank for one hundred dollars ($100.00) upon each share of the capital stock of said bank held or owned by them respectively at the time of the failure of said bank.

4. At the time of the failure of said bank, twenty shares of the capital stock thereof were in the name of one Henry Oetjen on the stock register of said bank, and certificates therefor were held by said Oetjen. But the said Oetjen was not the owner of said shares, but the same were in fact owned by the defendant.

5. One Overton S. Price had been the owner of said twenty shares of the capital stock of said bank, but had pledged them with the defendant as collateral security for a loan obtained by him from the defendant. By the terms of the contract between said Price and the defendant, whereby said loan was obtained and said shares made security therefor, if said loan was not paid and when due the defendant had the right to sell said shares and apply the proceeds of the sale upon said debt. Said Price having failed to pay said loan when due, the defendant apparently sold said shares to said Oetjen. Such sale being reported to the said First National Bank of Hills-

boro, Ohio, said shares of stock were, by the officers of said bank, transferred to said Oetjen.

6. Said purchase by said Oetjen was for and in behalf of
3 the defendant. Said Oetjen was, at the time he ostensibly bought said stock, and he still is an employee of the defendant. In said purchase of said shares he really acted for and as the agent of the defendant. The only consideration paid for said shares was the credit by the defendant upon said loan of Price of the amount for which said stock was bid off by said Oetjen, less the expense of said sale, said facts relating to said agents of Oetjen, and that his purchase of said stock was for the defendant, and that the defendant was and is the real owner thereof, were unknown to the officers of the First National Bank of Hillsboro, when they caused the transfer of said shares to be made to said Oetjen, and they have only recently become known to the plaintiff.

7. The defendant is a banking association duly organized under the laws of the United States for national banking associations, and as such is engaged in the business of banking, having its banking house at Cincinnati in said State, District and Division.

The plaintiff duly notified said Oetjen of said assessment on or about the 3rd day of May, A. D. 1897.

Neither the defendant or the said Oetjen has paid said assessment or any part thereof. Said Oetjen is pecuniarily irresponsible and wholly unable to pay said assessment.

By reason of said premises there is due from the defendant to the plaintiff as receiver as aforesaid the sum of two thousand dollars ($2,000), with interest thereon from the 27th day of May, A. D. 1897, at the rate of six per cent. per annum, and for which plaintiff asks judgment.

HENRY M. HUGGINS,
CHARLES W. SCOTT,
*Attorneys for Plaintiff.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Western Division:*

John Hulitt, being sworn, says that he believes the averments of his foregoing petition as receiver of the First National Bank of Hillsboro, Ohio, to be true.

JOHN HULITT,
*Receiver The First National Bank of Hillsboro, Ohio.*

Sworn to before me and signed in my presence this first day of October, A. D. 1900.

[SEAL.] S. D. WIGGINS,
*Notary Public, Hamilton Co., Ohio.*

4 And afterwards, to-wit, on the same day came the plaintiff by his attorneys, and filed in the clerk's office of the court aforesaid his certain præcipe in said cause, which said præcipe is clothed in the words and figures following, to-wit:

*Præcipe.*

To Clerk:

Please issue a summons for the defendant directed to the marshal of said court, returnable according to law.

Amount claimed, two thousand dollars, with interest from April 27th, A. D. 1897, at the rate of six per cent., per annum.

HENRY M. HUGGINS,
CHARLES W. SCOTT,
*Attorneys for Plaintiff.*

And thereupon there was issued out of the clerk's office of said court our certain writ of summons in this case, directed to the marshal of this district and against the said defendant, which said summons is clothed in the words and figures following, to-wit:

*Summons.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Western Division, ss:*

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to notify The Ohio Valley National Bank, a banking association duly organized under the laws of the United States, located at Cincinnati, Ohio, defendant, citizen of and resident in the State of Ohio, if it be found in your district, that it has been sued by John Hulitt, as receiver of the First National Bank of Hillsboro, Ohio, plaintiff, citizen of and resident of the State of Ohio in the United States Circuit Court, within and for the district and division aforesaid, at Cincinnati, and that unless it answer by the 10th day of November, A. D. 1900, the petition of the said plaintiff against it filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

5 You will make due returns of this summons on the 22nd day of October, A. D. 1900.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of October, A. D. 1900, and in the 125th year of the independence of the United States of America.

Attest:

[SEAL.] B. R. COWEN, *Clerk*,
By ROBERT C. GEORGI, *Deputy*.

And afterwards, to-wit, on the 10th day of October, in the year last aforesaid, came the marshal of said district to whom the said writ was in form directed and returned the same into the clerk's office of the court aforesaid with his proceedings endorsed thereon, clothed in words and figures following, to-wit:

*Marshal's Return.*

Received this writ on the 9th day of October, A. D. 1900, and on the 9th day of October, A. D. 1900, I served the Ohio Valley National Bank by handing a true copy thereof with the endorsement thereon to Clifford B. Wright, Vice President of said Ohio Valley National Bank personally.

VIVIAN J. FAGIN, *Marshal,*
By W. J. SANDERSON, *Deputy.*

Fees, total, $2.62.

And afterwards, to-wit, on the 10th day of November, A. D. 1901, an answer was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

*Answer.*

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff,

*vs.*

THE OHIO VALLEY NATIONAL BANK, Defendant.

Defendant, for answer to the petition, states:

1. It admits that the First National Bank of Hillsboro, Ohio, is a banking association, organized as alleged, doing business at
6 Hillsboro, Ohio, and that it suspended payment as alleged.

2. For want of knowledge it denies the allegations in the second paragraph of the petition.

3. For want of knowledge it denies each and every allegation of the third paragraph of the petition.

—. It admits that, at the time of the failure of said bank, twenty (20) shares of stock were in the name of Henry Oetjen on the stock register of said bank, and that certificates therefor were held by said Oetjen, but denies that said Oetjen was not the owner of said shares, and it denies that said shares were owned by this defendant.

5. Defendant admits each and every allegation contained in the fifth paragraph of the petition and defendant further answering said fifth paragraph of the petition states that said shares were in fact as well as apparently sold to said Oetjen.

6. Defendant admits that said Oetjen was and is one of its employés as alleged, and denies each and every other allegation in said sixth paragraph of the petition.

7. Defendant admits that it is a Banking Association as alleged; that the plaintiff notified said Oetjen of said assessment as alleged and that said assessment has not been paid. For want of knowledge it denies that said Oetjen is pecuniarily irresponsible and unable to pay said asessment. Defendant denies that it is indebted to the plaintiff in the sum of Two Thousand (2000) Dollars with interest or in any sum whatever.

Wherefore defendant prays to hence be dismissed with its costs.

JAMES J. MUIR,
MAXWELL & RAMSEY,
*Attorneys for Defendant.*

UNITED STATES OF AMERICA,
*Southern District of Ohio, Western Division:*

H. O. Tudor being duly sworn says that he is the Cashier of the Ohio Valley National Bank, defendant herein, and that he believes the averments of the foregoing answers are true.

O. H. TUDOR.

Sworn to before me and subscribed in my presence this 10th day of November, 1900.

[SEAL.] CHAS. C. BENEDICT,
*Notary Public, Hamilton —, Ohio.*

7–23 And afterwards, to-wit: on the 2nd day of October A. D. 1901, an Entry was made upon the journal of said Court clothed in the words and figures following, to-wit:

Entry J. 6—P. 303.

For good cause shown this cause is hereby continued to the next term of this court.

* * * * * * *

24 And afterwards, to-wit, on the 6th day of October, A. D. 1904, an entry was made upon the journal of said court clothed in the words and figures following, to-wit:

Entry J. 7—P. 474.

This cause coming on to be heard was submitted to the court, upon an agreed statement of facts, the parties having waived a jury in the premises. The court, upon consideration of the pleading, evidence and arguments of counsel, finds the issues joined in favor of the defendant.

It is therefore ordered, adjudged and decreed that the defendant go hence without day and recover its costs herein expended. To all of which the plaintiff, by his counsel, excepts.

And afterwards, to-wit, on the 6th day of October, A. D. 1904, a motion for a new trial was filed in the clerk's office of said court clothed in the words and figures following, to-wit:

*Motion.*

JOHN HULITT, Receiver, etc., Plaintiff,
*vs.*
THE OHIO VALLEY NATIONAL BANK, Defendant.

Now comes the plaintiff and moves the court here for a new trial in the above entitled cause, on the following grounds:

1. The finding of the court is against the facts as shown by the agreed statement of facts upon which cause was tried.
25 2. The finding of the court is against the law of the case of the agreed statement of facts on which the case was tried.
3. The judgment of the court should have been for the plaintiff instead of the defendant.

HENRY M. HUGGINS,
*Attorney for Plaintiff.*

And afterwards, to-wit: on the 6th day of October, A. D. 1904. An entry was made upon the Journal of said Court clothed in the words and figures following, to-wit:

J. 7—P. 474.

This cause coming on to be heard, on plaintiff's motion for a new trial the Court upon consideration finds the same not well taken, and it is ordered that said motion be, and the same is hereby overruled, to which the plaintiff by his counsel excepts.

And afterwards, to-wit; on the 14th day of November A. D. 1904, an entry was made upon the Journal of said Court clothed in the words and figures following, to wit:

Entry J. 7—P. 505.

Now comes the plaintiff and presents his Bill of Exceptions, which is allowed, signed, sealed, and made part of the record.

And afterwards, to-wit on the 14th day of November, A. D. 1904 a Bill of Exceptions was filed in the Clerk's office of said Court clothed in the words and figures following, to-wit:

*Bill of Exceptions.*

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff,
*vs.*
THE OHIO VALLEY NATIONAL BANK, Defendant.

Be it remembered that at the trial of this cause at the October term of the Circuit Court of the United States for the South-
26 ern District of Ohio, Western Division, beginning on the first Tuesday of said month A. D. 1904, the plaintiff and the

defendant to maintain the issues on their respective parts, offered in evidence an agreed statement of facts, in writing, and signed by said parties, as and for the evidence submitted by them respectively upon the issues joined in this cause. Said agreed statement was all the evidence submitted and offered by the said parties and considered by said Court upon the trial of said cause. Said agreed statement of facts is as follows:

"In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff,

*vs.*

THE OHIO VALLEY NATIONAL BANK, Defendant.

*Agreed Statement of Facts.*

1. On March 18th, 1893, one Overton S. Price, procured a loan from the defendant in the sum of ten thousand ($10,000) dollars, giving his promissory note therefor together with certain collateral securities recited in the body of said note, copy of which note, with all endorsements thereon, is hereto attached, made part hereof, and marked "Exhibit A."

2. On December 25th, 1893, said Price deceased, leaving said note at that time past due and unpaid. No payments have ever been made upon said note, except as hereinafter set forth. There is still a balance remaining due and unpaid upon said note.

3. On June 18th, 1894, the defendant made a formal transfer of the pledged stock of The First National Bank of Hillsboro, Ohio, and The Dominion National Bank of Bristol, Va., to one Henry Oetjen, an employee of the defendant, who was pecuniarily irresponsible. Said shares were transferred upon the books of said banks respectively and new certificates therefor issued in the name of said Oetjen, and delivered to him on July 7th, 1894. No money consideration passed to the defendant for said transfer and none
27 was expected nor did the defendant at that time credit said note with any sum by reason of said transfer, nor was any credit at that time endorsed upon said note, or entered in defendant's books. Said Oetjen endorsed in blank the certificates of stock which were issued to him.

4. Said transfer was made upon the understanding and agreement between said Oetjen and the defendant that the former should hold said stock as a security for the indebtedness of the estate of said Price upon said note, applying any amounts which he might realize from said stock as credits upon said note; that in pursuance of this agreement and understanding said Oetjen subsequently paid the defendant, on account of said note, a sum of money received by him from said Dominion National Bank on account of certain dividends which he received from time to time upon said Dominion National Bank stock until the same was finally sold by said Oetjen, where-

upon the proceeds of said sale were likewise applied by him upon said note.

5. That on February 19th, 1896, the defendant prepared proof of claim against the estate of said Price and at that time, believing the stocks transferred to said Oetjen to afford a reasonable security for said Exhibit A to the amount of forty-four hundred and eighty-four ($4,484.00) dollars, endorsed the credit for that amount upon said note, which appears upon Exhibit A, and filed its proof of claim against said estate for the balance of the indebtedness upon said note; that no consideration was paid for said credit and the same was not entered upon defendant's books; that all dividends arising upon said distribution of the estate of said Price were applied upon said note.

6. That said First National Bank of Hillsboro, Ohio, continued to do business until July 16th, 1896; that from the date of said transfer the stock in said bank at all times appeared on the books of said bank in the name of said Oetjen, that there was nothing on the books of said bank at any time to connect this defendant with said stock or to indicate that this defendant had any interest whatever in the same; that defendant at no time performed any act of ownership of said stock or exercised, or attempted to exercise, any of the rights of a stockholder of said bank or of the Dominion National Bank of Bristol, Va., unless the acts above set forth were, according to legal intendment, of that character. Defendant caused said shares to be transferred to said Oetjen because it was unwilling to assume the risk of the statutory liabilities of a stockholder in respect to said shares.

It is agreed that this cause may be tried *to* the Court,
28 without the intervention of a jury upon the foregoing agreed statement of facts.

Done at Cincinnati, Ohio, this 5th day of May, 1903.

ROBERT RAMSEY,
JAS. J. MUIR,
*Attorney- for Defendant.*
HENRY M. HUGGINS,
CHARLES SCOTT,
*Attorneys for Plaintiff.*

"EXHIBIT A."

$10,000. X. CINCINNATI, O., *March 18th,* 1893.

Ninety days after date I promise to pay Myself or order, Ten Thousand Dollars for Value Received, payable at the Office of A. C. Conklin & Co., having deposited or pledged as collateral security for the payment of this note,

| | | |
|---|---|---|
| 50 shrs. Citizens Nl. Bk. Stock, Hillsboro, O., | shrs. | $100 |
| 20 shrs. First Nl. Bk. Stock, Hillsboro, O., | shrs. | 100 |
| 40 shrs. Hillsboro Gas Light Co. Stock, | shrs. | 50 |
| 30 shrs. Dominion Nl. Bk. Stock, Bristol, Va., | shrs. | 100 |
| 100 shrs. Bk. of Camden Stock, Camden, O., | shrs. | 100 |
| 200 shrs. Bk. of Lynchburg Stk., Lynchburg, O., | shrs. | 50 |

And I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the City of Cincinnati, or elsewhere, at public or private sale at holder's option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale the holder may purchase without being liable to account for more than the net proceeds of such sale.

O. S. PRICE.

Endorsed—O. S. Price.

Forty-four hundred and eighty-four ($4,484.00) Dolls. paid on ac. of within note June 18, '94, being proceeds of sale of 30 shrs. stock Dominion Natl. Bank and 20 shares of stock 1st National Bk. of Hillsboro, O.

A jury having been waived by said parties, and the Court having found for and rendered judgment for the defendant, to
29 which finding and judgment the plaintiff excepted, and the plantiff having within three days from the date of said trial made a motion for a new trial which was overruled by the court, to which judgment of the Court in overruling said motion the plaintiff excepted, the plaintiff tenders this, his Bill of Exceptions, which is allowed, signed, sealed, and ordered to be made part of the record.

And afterwards, to-wit: on the 14th day of November, A. D. 1904, a petition of error was filed in the Clerk's office of said Court clothed in the words and figures following, to-wit:

At Law. No. 5486.

JOHN HULITT, Receiver of The First National Bank of Hillsboro, Ohio, Plaintiff,

*vs.*

THE OHIO VALLEY NATIONAL BANK, Defendant.

*Petition for Writ of Error.*

And now comes John Hulitt, receiver of the First National Bank of Hillsboro, Ohio, plaintiff, herein, and says that on or about the 6th day of October, 1904, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of errors so complained of, and that a transcript of the record proceedings, and papers in this cause duly authenticated, may be sent to the said Circuit Court of Appeals.

HENRY M. HUGGINS,
*Attorney for Plaintiff.*

30 And afterwards, to-wit: on the 14th day of November, A. D. 1904, an Assignment of Errors was filed in the Clerk's Office of said Court clothed in the words and figures following, to-wit:

*Assignment of Errors.*

At Law. No. 5486.

JOHN HULITT, Receiver of The First National Bank of Hillsboro, Ohio, Plaintiff,
*vs.*
THE OHIO VALLEY NATIONAL BANK, Defendant.

The plaintiff in this action, in connection with this petition for a writ of error, makes the following assignment of errors which he avers occurred upon trial of the cause, to-wit:

I. The court erred in its finding that the law of the agreed statement of facts was against the plaintiff and in favor of the defendant.

II. The court erred in overruling the motion of plaintiff for a new trial.

III. The court erred in entering judgment in favor of the defendant and against plaintiff.

HENRY M. HUGGINS,
*Attorney for Plaintiff.*

And afterwards to-wit on the 14th day of November, A. D. 1904, an Entry was made upon the journal of said Court clothed in the words and figures following, to wit:

Entry J. 7—P. 505.

This day comes the plaintiff by its attorney and presents to the court, and files in this suit its petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals held in Cincinnati, Ohio, for the Sixth Circuit; together with its assignment of errors in such behalf; and for satisfactory reasons to the court appearing the prayer of the said petition is hereby granted and such writ of error awarded, together with the usual citation in such case, upon the said plaintiff giving a supersedeas bond with good security according to law in the penal sum of $300.00.

31 And afterwards, to-wit: on the 30th day of November A. D. 1904, a bond was filed in the Clerk's Office of said Court, clothed in the words and figures following, to-wit:

*Bond on Writ of Error.*

Know all men by these presents, that we, John Hulitt Receiver of the First National Bank of Hillsboro, Ohio, as principal, and H. W. Roads and Isma Troth, as sureties are held and firmly bound unto

The Ohio Valley National Bank a banking association organized under the laws of the United States in the full and just sum of Three Hundred Dollars to be paid to the said The Ohio Valley National Bank a banking association as aforesaid certain attorneys executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of November in the year of our Lord one thousand nine hundred and four.

Whereas lately at a session of the Circuit Court of the United States within and for the Western Division of the Southern District of Ohio, in a suit depending in said Court, between John Hulitt, Receiver as aforesaid and The Ohio Valley National Bank a banking association as aforesaid, a judgment was rendered against the said John Hulitt, Receiver as aforesaid, and the said John Hulitt aforesaid having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Ohio Valley National Bank a banking association as aforesaid citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the Twenty-eight- day of December next.

Now the condition of the above obligation is such, that if the said John Hulitt, Receiver as aforesaid shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN HULITT. [SEAL.]
H. W. ROADS. [SEAL.]
ISMA TROTH. [SEAL.]

Approved by:
A. C. THOMPSON,
*Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.*

32 THE UNITED SATES OF AMERICA,
*Southern District of Ohio, Western Division, ss:*

I, Benjamin R. Cowen, Clerk of the Circuit Court of the United States, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and complete Transcript of the proceedings had by and before said Court in the above entitled cause as the same appears of record and on file in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Cincinnati, Ohio, this 1st day of December, A. D. 1904.

B. R. COWEN, *Clerk,*
By ROBT. C. GEORGI, *Deputy Clerk.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Southern District of Ohio, Western Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, and The Ohio Valley National Bank a banking association organized under the laws of the United States, a manifest error hath happened, to the great damage of the said John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things, concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the * 28th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to cor-
33 rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

B. R. COWEN,
*Clerk of the Circuit Court of the United States,*
*Southern District of Ohio.*
By ROBT. C. GEORGI, *Deputy.*

Allowed by,
HON. A. C. THOMPSON,
*Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.*

---

*Not exceeding 30 days from the day of signing the citation.

No. 5486. United States Circuit Court, Southern District of Ohio Western Division. John Hulitt, Receiver *vs.* The Ohio Valley National Bank. Writ of Error. Filed Nov. 30, 1904. B. R. Cowen, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
*Sixth Judicial Circuit, ss:*

To the Ohio Valley National Bank a banking association organized under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the * 28th day of December next, pursuant to a Writ of Error, Filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of Ohio, Western Division, wherein John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

34 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America the one hundred and twenty-ninth.

A. C. THOMPSON,
*Judge of United States District Court for Southern District of Ohio, Sitting and Holding United States Circuit Court.*

---

*Not exceeding 30 days from the day of signing.

Citation hereby waived and appearance entered.
OHIO VALLEY NATIONAL BANK,
By ROBERT RAMSEY, *Att'y.*

December 5, 1904.

No. 5486. United States Circuit Court, Southern District of Ohio, Western Division. John Hulitt, Receiver *vs.* The Ohio Valley National Bank. Citation. Filed Dec. 6, 1904. B. R. Cowen, Clerk. Error bond filed.

35 United States Circuit Court of Appeals, Sixth Circuit.

And afterwards, to-wit: on the 15th day of December, A. D. 1904 an appearance was filed in said court, clothed in the words and figures following, towit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1386.

JOHN HULITT, Receiver, etc.,
*vs.*
OHIO VALLEY NATIONAL BANK.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as Counsel for the plaintiff.

(Signed) HENRY M. HUGGINS.

And afterwards, to-wit: on the 12th day of April, A. D. 1905, a stipulation was filed in said court, clothed in the words and figures following, to-wit:

36 United States Circuit Court of Appeals, Sixth Circuit.

No. 1386.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, O.,
*vs.*
THE OHIO VALLEY NATIONAL BANK.

*Stipulation.*

It is hereby stipulated and agreed that the following words in the "Agreed statement of facts" inadvertently omitted in the transcript and printed record be inserted therein so as to conform to the original "agreed statement of facts" as signed and filed in the Court below; to-wit:

In the fourth paragraph of said "agreed statement of facts" there be inserted after the words "received by him" the words "from said Dominion National Bank an account of a reduction in the capital stock and also the amount of certain dividends which he received."

In the sixth paragraph of said "agreed statement of facts" there be inserted after the words "books of said bank" the words "in the name of said Oetjen, there was nothing on the books of said bank."

(Signed) HENRY M. HUGGINS,
*Attorney for Plaintiff in Error.*

(Signed) JAMES J. MUIR AND
ROBERT RAMSEY,
*Attorneys for Defendant in Error.*

Cincinnati April 12, 1905.

37 And afterwards, to-wit: on the 13th day of April, A. D. 1905, the following entry was made on the Journal of said Court, clothed in the words and figures following, to-wit:

Journal C, page 164.

Court met pursuant to adjournment. Present Honorables Horace H. Lurton, Henry F. Severens and John K. Richards, JJ.

No. 1386.

JOHN HULITT, Receiver First National Bank of Hillsboro, Ohio,
*vs.*
OHIO VALLEY NATIONAL BANK.

This cause is argued for plaintiff in error by Mr. Henry M. Huggins and for defendant in error by Mr. Robert Ramsey and is submitted to the Court.

And afterwards, to-wit: on the 2nd day of May, A. D. 1905, an entry was made on the Journal of said Court, clothed in the words and figures following, to wit:

Journal C, page 169.

38 United States Circuit Court of Appeals for the Sixth Circuit.

No. 1386.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio,
*vs.*
OHIO VALLEY NATIONAL BANK.

Error to the Circuit Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said Circuit Court with directions to enter a judgment for the plaintiff for the amount of the assessment with interest from May 27th, 1897.

39 And afterwards, to-wit: on the 11th day of May A. D. 1905 an opinion was filed, clothed in the words and figures following, to-wit:

*Opinion.*

40 Filed May 11, 1905. Frank O. Loveland, Clerk.

No. 1386.

United States Circuit Court of Appeals, Sixth Circuit.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff in Error,
*v.*
OHIO VALLEY NATIONAL BANK, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

Submitted April 13, 1905; Decided May 2, 1905.

Before LURTON, SEVERENS and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, delivered the opinion of the Court.

This suit was brought by the plaintiff in error, who is the receiver of the First National Bank of Hillsboro, Ohio, to recover an assessment levied by the Comptroller of the Currency upon the shareholders of the bank on acount of their extraordinary liability to creditors, the bank having become insolvent. The defendant in error is charged as the owner of twenty shares of the stock of the Hillsboro bank. To the petition the defendant filed an answer making a general denial of the plaintiff's allegations, in respect to its ownership of the stock. The case was heard in the court below upon an agreed statement of facts, which is embodied in a bill of exceptions and is as follows:

41 1. On March 18th, 1893, one Overton S. Price, procured a loan from the defendant, in the sum of ten thousand (10,000) dollars, giving his promissory note therefor together with certain collateral securities recited in the body of said note, a copy of which note, with all endorsements thereon, is hereto attached, made part hereof, and marked "Exhibit A."

2. On December 25th, 1893, said Price deceased, leaving said note at that time past due and unpaid. No payments have ever been made upon said note, except as hereinafter set forth. There is still a balance remaining due and unpaid upon said note.

3. On June 18th, 1894, the defendant made a formal transfer of the pledged stock of The First National Bank of Hillsboro, Ohio, and The Dominion National Bank of Bristol, Va., to one Henry Oetjen, an employee of the defendant, who was pecuniarily irresponsible. Said shares were transferred upon the books of said banks respectively and new certificates therefor issued in the name of said Oetjen, and delivered to him on July 7th, 1894. No money con-

sideration passed to the defendant for said transfer and none was expected, nor did the defendant at that time credit said note with any sum by reason of said transfer, nor was any credit at that time endorsed upon said note, or entered in defendant's books. Said Oetjen endorsed in blank the certificates of stock which were issued to him.

4. Said transfer was made upon the understanding and agreement between said Oetjen and the defendant that the former should hold said stock as security for the indebtedness of the estate of said Price upon said note, applying any amounts which he might realize from said stock as credits upon said note; that in pursuance of this agreement and understanding, said Oetjen subsequently paid the defendant, on account of said note, a sum of money received by him from said Dominion National Bank on account of a reduction in the capital stock and also the amount of certain dividends which he received from time to time upon said Dominion National Bank stock until the same was finally sold by said Oetjen, whereupon the proceeds of said sale were likewise applied by him upon said note.

5. That on February 19th, 1896, the defendant prepared proof of claim against the estate of said Price, and at that time, believing the stocks transferred to said Oetjen to afford a reasonable security for said Exhibit A to the amount of forty-four hundred and eighty-four ($4,484.00) dollars, endorsed the credit for that amount upon said note, which appears upon Exhibit A, and filed its proof of claim against said estate for the balance of the indebtedness upon said note; that no consideration was paid for said credit and the same was not entered upon defendant's books; that all dividends arising upon said distribution of the estate of said Price were applied upon said note.

42

6. That said First National Bank of Hillsboro, Ohio, continued to do business until July 16th, 1896; that from the date of said transfer the stock in said bank at all times appeared on the books of said bank in the name of said Oetjen; that there was nothing on the books of said bank at any time to connect this defendant with said stock or to indicate that this defendant had any interest whatever in the same; that defendant at no time performed any act of ownership of said stock or exercised, or attempted to exercise, any of the rights of a stockholder of said bank or of the Dominion National Bank of Bristol, Va., unless the acts above set forth were, according to legal intendment, of that character. Defendant caused said shares to be transferred to said Oetjen because it was unwilling to assume the risk of the statutory liabilities of a stockholder in respect to said shares."

"EXHIBIT A."

$10,000. X CINCINNATI, O., *March 18th*, 1893.

Ninety days after date I promise to pay myself or order, ten thousand dollars for value received, payable at the office of A. C. Conklin & Co., having deposited or pledged as collateral security for the payment of this note,

| | | | |
|---|---|---|---|
| 50 shrs. | Citizens Nl. Bk. Stock, Hillsboro, O., | shrs. | $100 |
| 20 shrs. | First Nl. Bk. Stock, Hillsboro, O., | shrs. | 100 |
| 40 shrs. | Hillsboro Gas Light Co. Stock, | shrs. | 50 |
| 30 shrs. | Dominion Nl. Bk. Stock, Bristol, Va., | shrs. | 100 |
| 100 shrs. | Bk. of Camden Stock, Camden, O., | shrs. | 100 |
| 200 shrs. | Bk. of Lynchburg Stk., Lynchburg, O., | shrs. | 50 |

And I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the city of Cincinnati, or elsewhere, at public or private sale at holder's option, on the non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale, the holder may purchase without being liable to acount for more than the net proceeds of such sale.

O. S. PRICE.

43 Endorsed: O. S. Price.

Forty-four hundred and eighty-four ($4,484.00) dollars, paid on account of within note June 18, '94, being proceeds of sale of 30 shares stock Dominion Natl. Bank and 20 shares of stock 1st National Bank of Hillsboro, O."

The court gave judgment for the defendant, to which the plaintiff excepted. No opinion was filed by the trial judge, but counsel assumed, and we suppose correctly, that the conclusion of the court was that the defendant was not the owner of the shares. That is the essential question in the controversy. The proposition that, in the absence of exceptional circumstances, the question to be settled, is who was the actual owner of the stock at the time when the operations of the bank were suspended, is established by repeated decisions of the Supreme Court. Recent decisions to this effect are, Pauly *v.* State Loan and Trust Co., 165 U. S. 606; Rankin *v.* Fidelity Insurance, etc., Co., 189 U. S. 242.

In dealing with the present case, we are limited to the facts contained in the agreed statement. We can infer no other facts unless they are necessary inferences from those agreed. It has been often said that that which is necessarily implied is as much a part of the agreement as if it were written into it. And this rule of interpretation is applied to the most solemn instruments, *inter partes*, as well as to statutes. But the implication must be one arising from legal intendment and not merely a deduction of fact.

For the purposes of the Banking Act the pledgor of stock is to be regarded as the owner, until and unless something further transpires which operates to transfer the ownership to another. The pledgee may, without himself becoming liable to the contingencies of ownership, have the stock transferred in blank by the pledgor, as was done in this case, but in such case the pledgor does not cease to be the owner in the sense intended by the law, and until the ownership is in some way divested from the pledgor, the latter continues to stand for the stock.

In a suit of this character, we are required to have regard to the relations of those who are concerned with the stock and their
44 dealings with it, and to ascertain who, as between such persons, is the actual owner of it, provided, of course, there is no transfer to the pledgee on the stock book of the bank, and no fraud upon creditors is found in their conduct. From the facts agreed, we think that probably, upon the authority of Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, it should be held that the defendant did not become the owner of the stock and so liable to be assessed on account of it, down to the time of the transaction which occurred during the settlement of the estate of Price in the Probate Court. After the death of the pledgor, Price, and on June 18th, 1894, the defendant transferred the stock to Oetjen without consideration given or expected. It was transferred to him on the stock book of the Hillsboro Bank. Oetjen endorsed the new certificates in blank. He was an employee of the bank and irresponsible, and in fact the defendant continued to control the stock notwithstanding the formal transfer to him.

While the Hillsboro National Bank was continuing to do business, and on February 19, 1896, the defendant filed a claim against the estate of Price, in the proper Probate Court, for the amount due on the note less the sum of $4,484, which it had endorsed as a sum "paid on account of within note June 18th, '94, being proceeds of sale of 30 shrs. stock Dominion Natl. Bank and 20 shares of stock 1st National Bk. of Hillsboro, O." The date, June 18th, '94, was the date of the transfer of the stock it made to Oetjen. It is to be inferred that the claim was allowed, as it is stated, not only that the claim was filed, but "that all dividends arising upon said distribution of the estate of said Price were endorsed upon said note." Afterwards, on July 6th, 1896, the Hillsboro bank ceased to do business.

It is stated in the agreed statement of facts that the transfer of the stock to Oetjen was made upon the agreement and understanding between him and the defendant that he should hold the stock as a security for the indebtedness of the estate of said Price upon the note; but it is not stated that this agreement was made known to the representative of Price's estate. Nor is it stated that the
45 act of the defendant in applying dividends from the estate upon the note was made known to said representative of the estate. And the maxim applies, *de non apparentibus et non existentibus eadem est ratio.*

Counsel for the defendant, in their brief, advance the following argument:

"It is said that this indorsement was evidence tending to show that the defendant had intended the transfer to Oetjen to be a sale absolute, and not merely by way of security. If that claim were sound, still the court has found that there was no intent of that character."

But the statement of the facts could not be affected by a finding of the court, any more than could a special verdict. It is, however, a mistake to say that the court found any facts. The record states that "the court, upon consideration of the pleadings, evidence and

arguments of counsel, finds the issues joined in favor of the defendant." But this means nothing more than that the court found the issues of law in favor of the defendant. The case in all particulars is like that of Supervisors *v.* Kennicott, 103 U. S. 554, where the court said

"It is true that in the judgment as entered, it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff on the case as stated."

In presenting and obtaining the allowance of its claim, the defendant represented that it had sold the stock and that it had appropriated the proceeds to the payment of the note; and the adjustment of its claim was made upon that footing. When it is said in the agreed statement "that no consideration was paid for said credit," meaning the endorsement of the $4,484, the interpretation must be that no other consideration "was paid" than such as the transaction itself imports. And granting that, notwithstanding the defendant's representation, there had in fact been no actual sale of the stock, we think the result of the proceedings in the Probate Court upon

46 the defendant's representation and claim was, as between the Price estate and the defendant, to transfer the ownership of the stock to the defendant for the consideration represented in the endorsement, and that the defendant could not thereafter claim against the estate that it had not appropriated the stock in satisfaction *pro tanto* of the sum due on the note. It may be that the representative of the Price estate might once have had some remedy to recover the stock, but he has made no claim for relief against the transaction, and it is manifest that he would now have no motive for doing so. The stock has become worse than useless. Whatever the undisclosed motive of the defendant may have been, we think the legal import of what was actually done was that it acquired the stock, and that the estate of Price no longer held it either for the benefits or burdens of ownership. No one could believe that the defendant when its claim was adjusted by the Probate Court expected to make further answer to the estate for this stock, or intended anything else than a conversion of it into its own property at the price for which it reported the stock sold. It would be unjust for it now to cast what has proved to be a disadvantage upon the party whom it dispossessed. The burden of the assessment must fall upon one of these parties, and we think the receiver has made the right selection.

The judgment should be reversed with costs and direction given to the court below to enter a judgment for the plaintiff for the amount of the assessment with interest from May 27th, 1897, the time when it became payable.

47 And afterwards, to-wit on the 14th day of July, A. D. 1905, a Petition for writ of error was filed in said court clothed in the words and figures following, to-wit:

United States Circuit Court of Appeals, Sixth Circuit.

No. 1386.

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff in Error,

*vs.*

THE OHIO VALLEY NATIONAL BANK, Defendant in Error.

*Petition for Writ of Error.*

Your petitioner, The Ohio Valley National Bank, defendant in error in the above entitled cause, respectfully shows that said cause is pending in this court; that a judgment was therein rendered on or about the 2nd day of May, 1905, reversing a judgment of the Circuit Court of the United States for the Southern District of Ohio,
48 Western Division, and directing that judgment be entered in favor of the plaintiff, towit: this defendant in error in these proceedings; that the matter in controversy in said suit exceeds one thousand dollars ($1000) exclusive of interest and costs; that the jurisdiction of neither of said courts was dependent in any wise, upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; that this cause does not arise under the patent laws, or under the revenue laws, or under the criminal laws of the United States; that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, being a cause wherein the plaintiff below is the receiver of a bank organized under the national banking laws of the United States, said receiver being appointed as such by the Comptroller of the Currency of the United States in accordance with the laws of the United States, and the defendant below being a bank organized under the national
49 banking laws of the United States.

Wherefore your petitioner would respectfully pray that a writ of error be allowed in the above entitled cause, directing the clerk of this court to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed may be reviewed, and if error be found, corrected, according to the laws and customs of the United States.

THE OHIO VALLEY NATIONAL BANK,
By ROBERT RAMSEY AND
J. J. MUIR, *Its Attorneys.*

The prayer for a writ of error contained in the foregoing petition is allowed and the Clerk of this Court is directed to transmit the record and proceedings had in said cause to the Supreme Court of the United States, as in said petition is also prayed.

HENRY F. SEVERENS,
*U. S. Circuit Judge.*

Dated July 25th, 1905.

50 And on the same day, to-wit: the 14th day of July, A. D. 1905, Assignment of Errors was filed in said Court, clothed in the words and figures following towit:

United States Circuit Court of Appeals, Sixth Circuit.

No. 1386.

JOHN HULITT, as Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff in Error,

*vs.*

THE OHIO VALLEY NATIONAL BANK, Defendant in Error.

*Assignment of Errors.*

Now comes the defendant in error, The Ohio Valley National Bank, by Robert Ramsey and J. J. Muir, its attorneys, and shows that in the record and proceedings in the United States Circuit Court of Appeals, Sixth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of this defendant in error, towit:

51 1. Said court erred in entering judgment reversing the judgment of the United States Circuit Court for the Southern District of Ohio, Western Division, and in directing that court to enter a judgment in favor of the defendant, towit: the above named plaintiff in error.

2. Said court erred in not affirming the said judgment of the Circuit Court of the United States for the Southern District of Ohio, Western Division.

3. Said court erred in finding that the plaintiff, towit: this defendant in error was a stockholder holding and owning shares of stock of the First National Bank of Hillsboro, as alleged in the petition, and that it was subject to an assessment or liability upon the same for the benefit of the creditors of said company.

4. Said court erred in other particulars apparent upon the record.

Wherefore defendant in error prays that for the errors aforesaid, and for other errors appearing in the record of said Circuit Court of Appeals in the above entitled cause to the prejudice of the

52 defendant in error, said judgment of said court may be reversed, annulled and for naught esteemed, and that this cause be remanded to said Circuit Court of Appeals with instructions to enter a judgment in favor of this defendant in error, or for such further proceedings in said cause as may be determined by this honorable court, to the end that justice be done in the premises.

THE OHIO VALLEY NATIONAL BANK,
By ROBERT RAMSEY AND
J. J. MUIR, *Its Attorneys.*

53 And afterwards, to-wit: on the 21st day of July, A. D. 1905, a bond was filed in said Court, clothed in the words and figures following, to-wit:

Know all men by these presents, That we, The Ohio Valley National Bank, as principal, and Joseph Rawson and T. J. Davis, as sureties, are held and firmly bound unto John Hulitt, Receiver, of the First National Bank of Hillsboro, Ohio, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said John Hulitt, Receiver, certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of July in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Circuit Court of Appeals of the United States for the Sixth Circuit, in a suit depending in said Court, between the Ohio Valley National Bank and John Hulitt, Receiver, a
54 judgment was rendered against the said Ohio Valley National Bank and the said Ohio Valley National Bank having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Hulitt, Receiver, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, October term 1905.

Now the condition of the above obligation is such, That if the said Ohio Valley National Bank shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OHIO VALLEY NATIONAL BANK, [SEAL]
By C. B. WRIGHT, *Pres.* [SEAL]

Sealed and delivered in presence of—
(Signed) JOSEPH RAWSON.
(Signed) J. J. DAVIS.

Approved.
(Signed) H. F. SEVERENS,
*Circuit Judge.*

55 And afterwards, towit: on the 25th day of July, an entry was made on the journal of said court, clothed in the words and figures following, to-wit:

Journal C, page 194.

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1386.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, O.,
*vs.*
THE OHIO VALLEY NATIONAL BANK.

*Order Allowing Writ of Error.*

Now comes counsel for the Ohio Valley National Bank and filed its petition for allowance of a writ of error to the Supreme Court of the United States together with its assignments of error in such behalf, and for satisfactory reasons to the Court appearing the prayer of said petition is hereby granted and such writ of error allowed with the usual citation in such cases upon giving a bond in the sum of Five Hundred ($500) Dollars.

HENRY F. SEVERENS,
*U. S. Circuit Judge.*

Dated July 25th, 1905.

56 *Writ of Error.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable the Judge of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you, between John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, Plaintiff in error and Ohio Valley National Bank, Defendan*d* in Error, a manifest error hath happened, to the great damage of the said Ohio Valley National Bank as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the * 24th day of August next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
*Clerk of the Circuit Court of the United States, Southern Dist. Ohio.*

Allowed by
HENRY F. SEVERENS,
*U. S. Circuit Judge.*

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*Not exceeding 30 days from the day of signing the citation.

57 The Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

Supreme Court of the United States.

To John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., on the * 24th day of August next, pursuant to a Writ of Error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the sixth circuit, wherein Ohio Valley National Bank is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of July, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States of America the one hundred and thirtieth.

HENRY F. SEVERENS,
*U, S. Circuit Judge.*

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*Not exceeding 30 days from the day of signing.

I hereby accept service of the within citation, this 5th day of August 1905.

HENRY M. HUGGINS,
*Attorney for Def't in Error.*

58 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings of this Court, together with the original writ of error and citation in the case of John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio, *vs.* The Ohio Valley National Bank No. 1386, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court at the City of Cincinnati, Ohio, this 8th day of August A. D. 1905.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

59 Supreme Court of the United States, October Term, 1905.

No. —.

THE OHIO VALLEY NATIONAL BANK, Plaintiff in Error,
*vs.*
JOHN HULITT, Receiver, Defendant in Error.

*Memorandum as to Printing Record.*

Plaintiff in error states that it intends to rely wholly upon the assignments of error based upon the rulings of the court on the agreed statement of facts as the same appears in the transcript of the record, and that the deposition of one Henry Oetjen is immaterial and not necessary to a consideration of any of said assignments of error.

Wherefore plaintiff in error requests that said deposition be omitted from the printed record of this cause.

ROBERT RAMSEY,
*Counsel for Plaintiff in Error.*

The defendant in error hereby consents to the omission of the deposition above referred to from the printed record of this cause.

HENRY M. HUGGINS,
*Counsel for Defendant in Error.*

60 [Endorsed:] File No. 19,891. Supreme Court U. S. October Term, 1905. Term No. 389. The Ohio Valley, National Bank, Pl'ff in Error, *vs.* John Hulitt, Receiver &c. Designation by counsel for plaintiff in error of parts of record to be printed & proof of service of same. Filed September 2d, 1905.

Endorsed on cover: File No. 19,891. U. S. Circuit Court of Appeals, 6th circuit. Term No. 108. Ohio Valley National Bank, plaintiff in error, *vs.* John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio. Filed August 30, 1905. **File no 19,891.**

**FILE COPY.**

Office Supreme Court, U.S.
FILED.
OCT 24 1906
JAMES H. McKENNEY
Clerk

# Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 108.

OHIO VALLEY NATIONAL BANK, *Plaintiff in Error*,

*vs.*

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio, *Defendant in Error*.

## BRIEF FOR PLAINTIFF IN ERROR.

ROBERT RAMSEY,

J. J. MUIR,
ROBERT RAMSEY,
Attorneys for Plaintiff in Error.

THE BARCLAY PRINTING CO., Strobridge Building, 108-118 W. Canal St., Cincinnati, O.

# Supreme Court of the United States.

OCTOBER TERM, 1906.

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No. 108.

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OHIO VALLEY NATIONAL BANK, *Plaintiff in Error*,

*vs.*

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio, *Defendant in Error*.

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## BRIEF FOR PLAINTIFF IN ERROR.

This was an action by the receiver of the insolvent Hillsboro bank, to recover an assessment levied by the Comptroller of the Currency against the shareholders, by virtue of section 5151 of the revised statutes.

The circuit court gave judgment for defendant. The circuit court of appeals reversed with direction to enter judgment for plaintiff.

Defendant, now plaintiff in error, asks for the reversal of the latter judgment and the affirmance of the original judgment in its favor.

### STATEMENT.

There was but one issue, to-wit: whether defendant was a shareholder within the meaning of the statute. The case was submitted to the court without the intervention of a jury

and upon an agreed statement of facts. The facts are these:

The shares in question were owned by one Price, registered in his name and by him indorsed in blank and delivered to defendant as collateral to his note. He died leaving his note past due and unpaid. Shortly afterward defendant made a formal transfer of the shares to its clerk Oetjen, who procured new certificates in his own name and thereupon became the registered holder of the shares. The terms and conditions of this transfer are expressed in the stipulation as follows:

"Said transfer was made upon the understanding and agreement between said Oetjen and the defendant, that the former should hold said stock as a security for the indebtedness of the estate of said Price upon said note, applying any amounts which he might realize from said stock as credits upon said note" (p. 8).

The stock remained in this situation nearly two years, during which time certain other collateral, transferred in the same way, was realized upon by Oetjen and the proceeds credited upon the note. Then it became necessary for defendant to file proof of claim against Price's estate, and out of that incident, according to the holding of the circuit court of appeals, defendant's liability as a shareholder arose. The stipulation proceeds at this point as follows:

"Defendant prepared proof of claim against the estate of said Price and at that time, believing the stocks transferred to said Oetjen to afford a reasonable security for said Exhibit A. [the note] to the amount of forty-four hundred and eighty-four ($4,484.00) dollars, endorsed the credit for that amount upon said note which appears upon said Exhibit A. and filed its proof of claim against said estate for the balance of the indebtedness upon said note" (p. 9).

The credit so indorsed was in these words:

"Forty-four hundred and eighty-four ($4,484.00) dollars,

paid on account of within note June 18, '94, being proceeds of sale of 30 shares stock Dominion National Bank and 20 shares of stock 1st National Bank of Hillsboro, O." (p. 10).

This indorsement was made nearly two years after the so-called sale which it recited. No consideration was paid for that credit, nor was it entered on defendant's books. As above stated, the indorsement on the note was merely defendant's way of estimating the value of the security and stating the balance as the amount of its claim as an unsecured creditor.

The agreed statement concludes with these admissions:

"That from the date of said transfer the stock in said bank at all times appeared on the books of said bank in the name of said Oetjen; that there was nothing on the books of said bank at any time to connect this defendant with said stock or to indicate that this defendant had any interest whatever in the same; that defendant at no time performed any act of ownership of said stock, or exercised, or attempted to exercise any of the rights of a stockholder of said bank . . . unless the acts above set forth were, according to legal intendment, of that character.

Defendant caused said shares to be transferred to said Oetjen because it was unwilling to assume the risk of the statutory liabilities of a stockholder in respect to said shares" (p. 9).

This was the status as to these shares when the Hillsboro bank closed its doors. If the Ohio Valley National Bank was at that time a shareholder within the meaning of the statute, the pending judgment must be affirmed, otherwise it must be reversed and the original judgment reinstated.

## ARGUMENT.

### I.

**The transfer to Oetjen did not bring defendant into such relation to the shares as to subject it to the statutory liability.**

This seems to be conceded by both courts below and by opposite counsel. Indeed the point is firmly established by the decisions of this court.

"A pledgee of shares of stock in a national bank who in good faith and with no fraudulent intent takes the security for his own benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure." Anderson, Receiver, vs. Philadelphia Warehouse Co., 111 U. S. 479.

Pauly vs. Trust Co. 165 U. S. 606.
Rankin vs. Fidelity Co. 189 U. S. 242.

The whole claim of the other side arises upon the incident which occurred nearly two years later, when defendant indorsed an arbitrary credit upon the note and made claim against the estate of Price for the balance. Let us look into that incident.

### II.

**Defendant's relation to these shares was not in any manner affected by its proof of claim against the debtor's estate.**

Defendant's indorsement on the note in 1896, referred to the transfer of 1894 as a sale. The parties have stipulated that it was not a sale, but a transfer by way of pledge. The recitals of the indorsement cannot be made use of to impair the force of that stipulation. In other words the parties have stipulated that there was no sale in fact, but that at one time defendant had stated that there was a sale. These are two

independent, coexisting facts, and each must receive its full legal significance in the determination of the case. If so, then any liabilities attaching to defendant because of its erroneous recital of 1896, attached then and there for the first time and because of an estoppel to deny. It is vital that there should be no confusion of ideas on this point. While the attitude of the circuit court of appeals in respect to it is not clearly defined, the point seems to be substantially conceded, thus:

"Granting that, notwithstanding the defendant's representation, there had in fact been no actual sale of the stock, we think the result of the proceedings in the probate court upon the defendant's representation and claim was, as between the Price estate and the defendant, to transfer the ownership of the stock to the defendant, for the consideration represented in the indorsement, and that the defendant could not thereafter claim against the estate that it had not appropriated the stock," etc. (p. 21).

This may be taken to mean that while defendant was not a shareholder from 1894 to 1896, he afterward became a shareholder by estoppel. To this claim of an estoppel defendant replies: (1) that plaintiff can not assert the administrator's personal right of estoppel; (2) that even the administrator could not assert it without showing a change of status induced by the representation, and this was not shown; finally, (3) that the language of the indorsement must determine the measure of the estoppel, and therefore that defendant could only be estopped to deny that Oetjen was the responsible shareholder.

(1). Starting with the admitted premise that defendant was not at any time, before or after the indorsement, a shareholder in fact, who is the party entitled to say: "Nevertheless you shall not deny that you are a shareholder?" Certainly not the receiver of the defunct bank. Defendant made no representations to him, nor to the creditors whom he represents.

"No person can rely upon an estoppel growing out of a transaction to which he was not a party nor privy, and which in no manner touches his rights." Deery vs. Cray, 5 Wall., 795.

"It is necessary to notice who sets up this plea of estoppel. An estoppel in pais does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." Ketchum vs. Duncan, 96 U. S. 659, 666.

(2). But even the person to whom the representation was made has sustained no injury and could therefore assert no right. How has he been prejudiced? By paying a dividend on part of the note of his intestate, and not upon all of it? To that extent he profited rather than lost by the representation.

It is suggested by the learned judge delivering the opinion now under review, that Price's estate might have claimed some equity in the stock but for this representation. He says:

"It may be that the representative of the Price estate might once have had some remedy to recover the stock, but he has made no claim for relief against the transaction, and it is manifest that he would now have no motive for doing so. The stock is worse than useless" (p. 21).

Thus in one sentence the court suggests that possibly the administrator may have been misled, and in the next, makes it clear that the possible deception worked to his advantage rather than otherwise, in saving him from a stockholder's liability.

But the point may be disposed of by saying that the record is entirely silent as to any prejudice sustained by the administrator. He is not a party to this action and his status is not alluded to in the agreed statement of facts.

(3). But what would be the scope of the estoppel if successfully asserted in this case?

"The measure of the operation of an estoppel is the extent

of the representation made by one party and acted on by the other. The estoppel is cimmensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true," 2 Pomeroy Eq. Jur. Sec. 813.

The indorsement represented that in 1894 defendant had made an absolute sale of these shares to one Oetjen, for the sum of $4,484.00 which Oetjen then and there paid, and which defendant then and there credited on the note. If that representation had been true, Oetjen would have been the shareholder and liable to the receiver in this action.

The whole subject of estoppel is so readily disposed of that one is impressed with the thought that the learned reviewing court was unconsciously influenced by a skepticism touching the facts agreed upon by the parties. Accordingly these words in the course of the opinion cause no surprise:

"Whatever the undisclosed motive of the defendant may have been, we think the legal import of what was actually done was that it acquired the stock, and that the estate of Price no longer held it either for the benefits or burdens of ownership. No one could believe that the defendant, when its claim was adjusted in the probate court, expected to make further answer to the estate for this stock, or intended anything else than a conversion of it into its own property at the price for which it reported the stock sold" (p. 21).

To these observations defendant replies:

Defendant's motive was not "undisclosed." The avowed motive of the transfer was to avoid the danger of a stockholder's liability. This was not only defendant's privilege, but its duty to its own stockholders. It adopted the course approved by repeated decisions of this court, some of which are cited above. The avowed motive of the indorsement was to preserve the status created by the transfer, defendant "believing" the stock transferred, to be a "reasonable security" for the amount credited. The stipulation as quoted, absolves

defendant of any intent to convert the stock to its own use, and it is difficult to perceive how the act of clothing a third party with the apparent ownership, would saddle the stock on the defendant in the absence of such intent.

Nor have we here any occasion for the weighing of evidence. The words "no one could believe" have no place in the decision of questions of law. What defendant would or would not have done had Price's administrator sought to redeem this stock in the hands of Oetjen, is not matter for speculation in this case. That might form the basis of an interesting speculation in the mind of the administrator if he contemplated an action. As between the parties to this action every inquiry of fact is concluded by the stipulation. It settles not evidential matter, from which conclusions of fact might be drawn; it determines the ultimate conclusion of fact on each issue in the case. The three broad conclusions of fact upon which the decision must rest are first, that the transfer to Oetjen was by way of security; second, that the subsequent indorsement was made because defendant believed that the stock still afforded "security;" third, that defendant at no time exercised or sought to exercise any act of ownership over the stock unless the foregoing acts were, according to "legal intendment" of that character.

The decision of the intermediate court can only be sustained by arbitrarily expunging from the record one or the other of these three stipulated conclusions of fact.

## CONCLUSION.

Where a stockholder seeks by any device to disguise himself for the purpose of escaping this statutory liability, this court has always scrutinized the transaction with a jealous eye; but where a party who has never held that relation, adopts ways and means to protect himself against the danger of apparent ownership, this court has always recognized his

right. Where, as in the case at bar, the party so seeking to protect himself happens to be a national bank, this court declares that there is not merely the right, but the duty of self-protection. It has gone so far as to say that national banks lack corporate power to incur the risks of a speculative enterprise, or partnership liabilities, by taking or holding corporate or syndicate shares, even though taken in satisfaction of a debt, and that estoppel will not lie to bar the defence. I refer of course to the recent cases of

First National Bank vs. Converse, 200 U. S. 425.
Merchants National Bank vs. Wehrmann, 202 U. S. 295.

If a national bank may not by its deliberate, intentional act bring itself into any relation toward shares which would involve it in liabilities of that character, may we not justly conclude that it not only may, but must, in the lawful exercise of its corporate functions, avoid so far as possible the ownership or appearance of ownership of all securities which subject the shareholder to liability of any kind?

If the bank becomes in fact a shareholder, no doubt under the law as it now stands, the liability attaches; though in view of the last two decisions above cited, it may one day be held otherwise. But where the national bank is not in fact a shareholder it may protect itself in any way which would not work a fraud upon the creditors of the other corporation and give rise to an estoppel. Such is the case at bar.

The judgment of the circuit court was right and should be affirmed, and the judgment of reversal should be vacated.

Respectfully submitted,

ROBERT RAMSEY.

J. J. MUIR,
ROBERT RAMSEY,
Attorneys for Plaintiff in Error.

FILE COPY

IN THE

# SUPREME COURT OF THE UNITED STATES.

**No. 108.**

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OHIO VALLEY NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

JOHN HULITT, RECEIVER OF THE FIRST NATIONAL BANK OF HILLSBORO, OHIO,
DEFENDANT IN ERROR.

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## BRIEF FOR DEFENDANT IN ERROR.

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### STATEMENT OF CASE.

The suit was brought by the defendant in error as receiver of the First National Bank of Hilsboro, Ohio, to recover from plaintiff in error an assessment made by the comptroller of the currency upon the shareholders of that bank, and upon the claim that the plaintiff in error is the actual owner of twenty shares of its stock. The plaintiff in error, in substance, made a general denial.

The case was heard below upon an agreed statement of facts set forth in the Record, pages 8-10, and which is, substantially, as follows:

1. On March 18, 1893, one Overton S. Price borrowed of the plaintiff in error $10,000, for which he gave his note secured by collateral, part of which was twenty shares of the stock of the First National Bank of Hillsboro, Ohio, and thirty shares of the stock of the Dominion National Bank of Bristol, Virginia. The note gave plaintiff in error full power to sell the collateral at any place, at public or private sale, without notice to Price, and if such sale was public, plaintiff in error could purchase without being liable to account for more than the net proceeds. (Agreed Statement, Exhibit A, Record, pages 9-10.)

2. On December 25, 1893, Price died, having paid nothing on said note. No payments have since been made thereon except as hereinafter set forth.

3. "On June 18, 1894, the plaintiff in error made a formal transfer of said national bank stock to one Henry Oetjen, one of its employes, who was pecuniarily irresponsible." Said shares were, by said banks respectively, transferred upon their books to Oetjen, and certificates therefor were issued to and delivered to him on July 7, 1894. No money was paid to plaintiff in error for said transfer and none was expected. Plaintiff in error did not, at that time, make any credit upon said note by reason of said transfer. Plaintiff in error did not, at that

time, enter any credit on its books because of said transfer. Oetjen endorsed said certificates of stock in blank.

4. Said transfer was made upon the agreement between Oetjen and the plaintiff in error that he should hold said stock as a security for said debt of Price, applying anything he might get from the security upon the debt. Pursuant to this agreement Oetjen did pay over to plaintiff in error moneys received by him from time to time from said Dominion National Bank stock, until he sold it, whereupon the proceeds of such sale were likewise by him applied on said note.

5. On February 19, 1896, the plaintiff in error prepared proof of claim against Price's estate. At that time it indorsed upon said note a credit as follows:

"Forty-four hundred and eighty-four ($4484.00) dollars paid on account of within note, June 18, '94, being proceeds of sale of thirty shares stock Dominion National Bank and twenty shares of stock First National Bank of Hillsboro, O."

Plaintiff in error believed, at the time of making said credit, that said national bank stocks afforded a reasonable security in the amount so credited for Price's debt to it. Having made said credit, plaintiff in error filed its proof of claim against the estate of Price for the balance remaining upon said note less said credit. No consideration was paid for said credit, except as herein stated. All dividends from the estate of Price received by plaintiff in error have been applied upon the note.

6. The First National Bank of Hillsboro, Ohio, continued open until July 16, 1896. From the date of the transfer of said stock to Oetjen it appeared at all times in his name on the books of the bank. Nothing appeared, on said books, at any time, to indicate plaintiff in error had any interest in the same. Plaintiff in error did not exercise, or attempt to exercise, any right as a stockholder in said stock unless the matters herein set forth were, by legal intendment, of that character. Plaintiff in error caused said shares to be transferred to Oetjen because it was unwilling to assume the liability of a stockholder in respect to said shares.

## BRIEF OF ARGUMENT.

The question to be determined is:

Upon the agreed facts is the plaintiff in error the actual owner of the shares of stock of the First National Bank of Hillsboro, Ohio, pledged to it by Price?

For the defendant in error it is submitted:

### I.

Somebody must be the actual owner of the stock in question. There are but three possible owners: Price's estate, Oetjen, or the plaintiff in error.

Price's estate does not own it because: In the contract with plaintiff in error Price gave it a power of sale. (Pages 9-10, Record.) The plaintiff in error reported to Price's administrators an execution of this

power, first, by the credit upon the note from the proceeds of the sale of this stock; second, by the reduction of the amount of the claim in the amount of the proceeds of such sale; third, by receiving dividends from the estate of Price upon the balance of claim after such credit. (Record, pages 8, 9, 10, Agreed Statement.)

Price's administrators ratified such sale by acquiescence therein, as shown by payment of dividends upon claim of plaintiff in error as reduced by such credit.

Oetjen, while liable because held out as owner with his consent, is not the actual owner for these reasons: He paid nothing for the stock. By his express contract he only was ostensible owner for the benefit of the plaintiff in error, or Price's estate, or both. If he was a trustee for plaintiff in error, or Price's estate, or both, that trust was executed and terminated by the report of the sale evidenced by the credit on the note made in pursuance of the power given in the contract of pledge. If this power of sale was not exercised in the exact mode prescribed, *i. e.*, by public instead of private sale, that was waived by Price's estate by the acquiescence of his administrators. This acquiescence is shown by payment of dividends on Price's debt to the plaintiff in error reduced by the amount of the proceeds of the sale of stock as reported to them in the credit of $4484.06, placed on the note.

It follows, as we think, that plaintiff in error was, from the date of the presentation of its claim to Price's estate, reduced by the credit of the proceeds of the sale of the

stock, and the acceptance of the claim thus reduced, the actual owner.

The learned counsel for plaintiff in error states in the beginning of his argument this: "Defendant's indorsement on the note in 1896, referred to the transfer of 1894 as a sale. The parties have stipulated that it was not a sale, but a transfer by way of pledge."

We do not so understand the stipulation. The stock before it was transferred to Oetjen was in pledge to the bank. The transfer to Oetjen could hardly pledge it over again to the bank. And the transfer could hardly pledge it to Oetjen. Oetjen agreed, according to the stipulation, to hold the stock "as a security for the indebtedness of said Price upon said note." That is to say: Oetjen agreed with the bank that although the shares were, in form, transferred to him, the bank should not change its position in relation to them in fact, but should still have the benefit of them as security for its note.

The learned counsel for plaintiff in error, in the same connection, further states: "In other words, the parties have stipulated that there was no sale in fact, but at one time defendant had stated that there was a sale." We do not think this to be the meaning of the stipulation.

We have not claimed that there was a sale of the stock at the time of the transfer to Oetjen. The plaintiff in error filed its claim against Price's estate reduced by what it then said was proceeds of sale of the stock. Price's administrators accepted the claim thus reduced

and paid dividends on it which plaintiff accepted. This extinguished any rights Price's estate may have had. It extinguished such rights not by estoppel, but by acquiescence in a sale as reported to its representatives. If the plaintiff in error chose to date its credit on the note in 1894, instead of 1896, that could not alter the legal effect of what took place between plaintiff in error and the representatives of Price's estate. It seems to us that the argument of the learned counsel for plaintiff in error with relation to estoppel does not give weight enough to the fact that Price's estate accepted and acted upon what the plaintiff in error did in its credit upon the note and report of sale of the stock.

II.

This case is distinguished from the cases of

Rankin, Receiver, v. Fidelity Ins., Trust & Safe Deposit Co., 189 U. S., 241-2.
Pauly v. State Loan & Trust Co., 165 U. S., 606.
Anderson v. Philadelphia Warehouse Co., 111 U. S., 479.

If the plaintiff in error had done nothing more than put this stock in the name of its irresponsible servant, Oetjen, for the purpose of avoiding stockholder's liability, it may be that the law of the cases named would sustain it. But plaintiff in error did more than make Oetjen its and Price's estate's trustee, to hold this stock. After taking this step the plaintiff in error radically changed its position with relation to Price's estate. After it presented its claim against Price's estate reduced in

the amount of $4484.00 by proceeds of the sale of the stock, and after Price's estate acquiesced in this and in so doing put itself in a position that precluded it from making any claim to the stock, the plaintiff in error could hardly say that it, or its servant, Oetjen, was the trustee in any way for Price's estate.

For the reasons given in the dissent of Justice Miller, concurred in by Justice Matthews, in Anderson v. Warehouse Co., 111 U. S., 481, the law can not, we think, be well carried further in the direction of release of liability than it has been carried by the series of cases we have cited. We submit that the release of everybody concerned except the irresponsible Oetjen from stock liability upon the facts disclosed here would be a long step further in that direction.

It will be noticed from the amount of the credit on the note, and the fact that plaintiff in error believed at the time it made the credit that the stock was good security for that amount, that the plaintiff in error then placed a very substantial value on this stock. There were thirty shares of Dominion and twenty shares of First National, the par value of all which would be $5000.00. The credit was $4484.00. The credit was made February 19, 1896. The bank did not fail till July 16, 1896.

In Rankin v. Fidelity Ins. & T. & S. D. Co., *supra*, the question submitted to the jury was, "Whether before the Keystone National Bank failed, the defendant company, the Fidelity Trust Company of this city, was the real owner of these shares of stock, or whether it con-

tinued to be the pledgee of the stock—whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner,' or whether it had continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence." 189 U. S., 793.

The jury found the defendant in that case still pledgee. But in this case the plaintiff in error by its own act ceased to be pledgee.

In Pauly v. State L[illegible] & Trust Co., 165 U. S., 844, the question was th[illegible] *e.*, was the defendant still "a mere pledgee of [illegible] in a national bank." It was found that defendant was a pledgee only.

Can that be found in this case when the pledgor has ratified a sale of the pledge reported by the pledgee?

In Anderson v. Phila. Warehouse Co., the question was still the same—was the defendant "a mere pledgee," or had he become the real owner? The jury found that the defendant, by causing the stock to be held in the name of its irresponsible servant did not cease to be pledgee. The reviewing court, in the opinion by Justice Harlan, finds that "as between Blumer & Co."—the pledgors—"and the Warehouse Company"—the defendant—"Blumer & Co., or Kern"—Kern was a member of the firm of Blumer & Co.—"were the owners of the stock, and the company"—the defendant—"was the pledgee." But would the court have said this if the defendant in the case, the Phila. Warehouse Co., had reported to Blumer & Co., the pledgor, a sale of the stock and a reduction of

the debt for which the stock stood pledged in the amount of such sale, and if Blumer & Co. had acquiesced in and ratified the sale?

In each of these cases the holding rests upon the ground, as we understand, that the bank continued to be pledgee. That being held it follows that the pledgor continued to be pledgor. The irresponsible person to whom the stock was transferred had no relation to the stock as pledgor or pledgee. It can hardly be claimed that after the credit upon the note, the report of the sale of the stock and the acceptance thereof by Price's administrators that his estate remained pledgor. If Price's estate ceased to be pledgor by consequence plaintiff ceased to be pledgee. The ownership of the stock did not, certainly, get back into Price's estate after the sale reported to and ratified by his administrators. It is not claimed, as we understand, that Oetjen is or was the actual owner after the credit, report of sale and acceptance of the claim thus reduced by Price's administrators. Where, then, was the actual ownership if not in plaintiff in error?

## III.

We submit the following as a test of the actual ownership of the stock in question:

If the First National Bank of Hillsboro had paid dividends after the credit on the note, and after the reception by the plaintiff in error of dividends on the note less such

credit from Price's estate, who would have been entitled to such bank dividends as owner of the stock?

Not Oetjen. He never had any right to dividends. Not Price's estate. His administrators, having acquiesced in and ratified the credit whereby their trust got value for the stock had no right.

It follows that the plaintiff in error would have been entitled to such dividends *as owner*. And if the plaintiff should, in the execution of his trust, be able to pay a dividend to the stockholders of this bank, the plaintiff in error would be entitled, as owner, to such dividend on the stock in question.

Respectfully submitted,

HENRY M. HUGGINS,

R. T. HOUGH,

Counsel for Defendant in Error.

# Supreme Court of the United States.

No. 108.—October Term, 1906.

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| Ohio Valley National Bank, Plaintiff in Error, *vs.* John Hulitt, Receiver of the First National Bank of Hillsboro, Ohio. | In error to the United States Circuit Court of Appeals for the Sixth Circuit. |

[January 7, 1907.]

This case was begun in the United States Circuit Court by John Hulitt as receiver of the First National Bank of Hillsboro, Ohio, against the Ohio Valley National Bank, to recover the amount of an assessment upon certain shares of the stock of the Hillsboro Bank, which had become insolvent, which assessment was directed by the Comptroller of the Currency in accordance with the provisions of the national bank act. The case was tried upon an agreed statement of facts, from which it appears that on March 18, 1893, one Overton S. Price, for a loan of $10,000, gave his promissory note of that date to the Ohio Valley Bank, due ninety days after date, payable to his own order and indorsed by him, and deposited as collateral security for the note, among other securities, fifty shares of stock of the said First National Bank of Hillsboro, Ohio. The note had a power of sale attached to it, signed by Price, and authorizing the holder to sell or collect any portion of the collateral, at public or private sale, on the non-performance of the promise, and at any time thereafter without advertising or otherwise giving Price notice, and providing that in case of public sale the holder might purchase without liability to account for more than the net proceeds of the sale.

On December 25, 1893, Price died, leaving the note due and unpaid, and no payments have been made thereon except as hereinafter stated.

On June 18, 1894, the bank made a transfer of the pledged stock of the First National Bank of Hillsboro, and also of certain other stock in the Dominion National Bank of Bristol, Va., to one Henry Otjen, an employe of the bank, and pecuniarily irresponsible. The shares were transferred on the books of the banks and new certificates issued in the name of Otjen and delivered to him on July 7, 1894. Otjen indorsed the certificates in blank. No money passed in consideration of the transfer, and none was expected, nor was any credit given or indorsed on the note by reason thereof.

The transfer was made upon the understanding and agreement between Otjen and the bank that Otjen should hold the stock as security for the indebtedness of the estate of Price upon the note, he to apply any amounts which he might realize from said stock as credits upon the note. In pursuance of this agreement Otjen subsequently paid the bank sums received from the Dominion National Bank on account of dividends received until the sale of that stock, when the proceeds of sale were likewise applied by him upon the note.

On February 19, 1896, the bank prepared proof of claim against the estate of Price, and at that time believing the stocks transferred to Otjen to afford a reasonable security for the note to the amount of $4,484, indorsed a credit for that sum upon the note, as follows: "Forty-four hundred and eighty-four ($4,484.00) dolls. paid on ac. of within note June 18, '94, being proceeds of sale of 30 shrs. stock Dominion National Bank and 20 shares of stock 1st National Bank of Hillsboro, O." The bank filed its proof of claim for the balance of the indebtedness upon the note; that no consideration was paid for said credit, and the same was not entered on the bank's books; that all dividends arising upon the distribution of the estate of Price were applied upon the note.

The Hillsboro bank continued to do business until July 16, 1896. From the date of transfer at all times the stock appeared on the books of the Hillsboro bank in the name of Otjen, there being nothing on the books to connect the Ohio Valley National Bank with the stock, or to indicate that it had any interest therein; that the defendant bank at no time performed any act of ownership, or exercised or attempted to exercise any of the rights of a stockholder in said bank, or of the Dominion National Bank, unless the acts stated were in legal intendment of that character. The Ohio Valley National Bank procured the shares to be transferred to Otjen because it was unwilling to assume the risk of the statutory liability of a stockholder in respect thereto. The Circuit Court of Appeals held the bank liable as a stockholder, (137 Fed. Rep. 461,) and directed judgment accordingly.

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

Section 5151 of the Revised Statutes provides that the shareholders of every national banking association shall be held individually responsible, equally and ratably, not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. This section undertakes to hold all shareholders responsible, and questions have arisen under varying circumstances as to what constitutes such shareholder.

In *Anderson* v. *Philadelphia Warehouse Company*, (111 U. S. 479,) it was held that the mere pledgee who had never acted as a shareholder would not be liable as such, notwithstanding the stock was transferred on the books of the bank and the certificate issued to an irresponsible person, in that instance a porter in the employment of the company, and this although the transfer had been thus made for the purpose of avoiding liability which might be incurred by the shareholders of the bank, in case of insolvency. In the course of the opinion, Mr. Chief Justice Waite, speaking for the court, recognized that the real owner might be held liable as a shareholder, but in that case the facts showed the warehouse company, sought to be held as a shareholder, was never other than a pledgee, and that notwithstanding the transfer to the irresponsible person, the real ownership of the stock remained in the original holder.

In *Pauly* v. *The State Loan & Trust Company*, (165 U. S. 606,) the subject was considered at length, and it was held that one who was described in the certificate as a pledgee, and who in good faith held the shares as such, was not a shareholder subject to the personal liability imposed by section 5151. The previous cases in this court were reviewed, and, in summing up the rules relating to the liability of shareholders in national banks, deducible from previous decisions, among other things it was said: "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151." And again: "The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of the parties as they actually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors, Congress did not say that those only should be regarded as shareholders liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official lists of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders within the meaning of section 5151 who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners."

And in *Rankin* v. *Fidelity Trust Company*, (189 U. S. 242, 252,) the doctrine was stated that a defendant who was in fact the owner of shares of stock could not avoid liability by listing them in the name of another, notwithstanding it might do so if it were the mere pledgee of the stock; and further, that the case then under consideration turned upon the

actual ownership of the shares, which question was properly left to the jury. And to the same effect are well considered cases in other courts, Federal and State. It was held that the real owner might be charged, although his name never appeared upon the books of the bank. (*Davis* v. *Stevens*, 17 Blatch. 259, 7 Fed. Cas. 3653, opinion by Mr. Chief Justice Waite; *Holton* v. *Hubbell*, Circuit Court of Appeals, First Circuit, 91 Fed. Rep. 453; *Lang* v. *Burley*, 101 Ill. 591; *Leasassier* v. *Kennedy*, 36 La. An. 539.)

Assuming then the established doctrine to be that the mere pledgee of national bank stock cannot be held liable as a shareholder so long as the shares are not registered in his name, although an irresponsible person has been selected as the registered shareholder, we deem it equally settled, both from the terms of the statute attaching the liability and the decisions which have construed the act, that the real owner of the shares may be held responsible, although in fact the shares are not registered in his name. As to such owner the law looks through subterfuges and apparent ownerships and fastens the liability upon the shareholder to whom the shares really belong.

Applying these principles to the case at bar, we think there can be no doubt of the liability of the Ohio Valley National Bank in this case. Conceding that it was exempt so long as the relation which it held to the stock was that of a pledgee, and that Otjen was the registered stockholder holding for the benefit of the bank as pledgee and not as owner, what was the attitude of the parties after the death of Price and the credit of the supposed value of the stock upon the note and its presentation for allowance and acceptance by the representatives of Price's estate? As the foregoing statement shows, the stock was originally delivered to the bank, with a power of public or private sale for the liquidation of the pledge. After the death of Price the bank caused the stock to be registered in the name of Otjen. After proof of the claim the dividends paid out of the Price estate were credited upon the note. If the bank had followed literally the authority of the power of attorney attached to the note and sold the stock at public or private sale, and itself become the purchaser, we take it there could be no question that it would thus have become the real owner of the stock, and, within the principles of the cases heretofore cited, the shareholder liable under the terms of the statute. We think what was in fact done necessarily had the same effect; the bank applied the value of the stock with the consent of the pledgor, and thus vested the title in the bank.

It is urged that although the indorsement upon the note in the form in which it was presented to Price's administrator recited credit as of June 18, 1894, being proceeds of a sale of the stock, there never was a sale in fact, and that the bank is not estopped by anything shown in the case from showing the true situation and the actual transaction between the parties.

Conceding, for this purpose, that Price's representative could have insisted upon a strict performance of the power conferred in the authority given to the bank as to the disposition of the collateral, yet if the representative of Price desired to do so there was nothing to prevent him from waiving a strict compliance with the terms named and permitting the bank to acquire title to the stock by crediting its value on the note. This is in fact what was done. Instead of selling the stock the bank, in executing the authority conferred, indorsed what it deemed the value of the stock, as of the date of the credit, upon the note, and reduced by the amount of this valuation, presented the note to the administrator of Price, who must have allowed the claim in this form, as it is specifically stated that the subsequent dividends upon the claim were paid to the bank. By this transaction, who became the real owner of the stock? Certainly not Otjen, for it is not contended that he was other than a mere holder of the stock as collateral security to the bank without any beneficial interest. Price had died, and his representative had allowed the claim, showing the application of the value of the stock as a credit upon the note. If Price's representative could have objected to the form in which the bank liquidated the pledge, he did not do so, but accepted the bank's method of divesting him of title by allowing the claim with the credit upon it. The bank thus become the beneficial owner of the stock, and had the Hillsboro National Bank continued solvent it certainly could not have denied to the Ohio Valley Bank after this transaction the rights and privileges of a stockholder.

As we have seen, this court in construing the banking act has not limited the liability to the registered stockholders. While the registered stockholders may be held liable to creditors regardless of the true ownership of the stock, and the pledgee of the stock not appearing otherwise, is not liable, although the registered stockholder may be an irresponsible person of his choice, yet where the real ownership of the stock is in one his liability may be established, notwithstanding the registered ownership is in the name of a person fictitious or otherwise, who holds for him.

We think the Circuit Court of Appeals did not err in holding the bank, in view of the facts shown in the case, as the true owner and responsible shareholder of the stock in question.

*Judgment affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*